IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.2296 OF 2005

Dattatraya C. Dhapte and others ... Petitioners

v/s

Sardar Kartarsingh Lalsingh ... Respondent

Mr J.S. Kini for Petitioners.

Ms Deepa Sinha i/b Mr Mahesh Menon and Co. for Respondent.

CORAM : D.K. DESHMUKH J.

DATE : 19TH OCTOBER 2005

P.C. :-

1. On 28th September 2005, I had made following order in this petition.

> "This is a petition filed under Article 227 of the Constitution of India challenging the judgment and decree passed by the Appeal Court viz. The District Court dismissing the appeal filed by the petitioners against the judgment and decree passed in R.C.S. No.1278 of 1976. When I put it to the learned counsel appearing for petitioners whether second appeal lies against the judgment and decree of the Appeal Court to this Court, he stated that though second appeal lies against the judgment and decree of the Appeal Court, he has not filed second appeal under section 100 of the CPC but has filed petition under Article 227 of the Constitution of India because substantial questions of law do not arise. When I asked the learned counsel to satisfy me that in this situation petition under Article 227 of Constitution of India can be entertained when second appeal is provided by law to this very

> Court, the learned counsel sought time to get ready with the matter. At the request of the learned counsel, put up next week. I have made it clear to the learned counsel that in case he is not able to satisfy me that such a petition can be entertained, then the Court proposes to impose exemplary cost on the petitioners. Put up next week."

. After the matter was called out today, the learned counsel appearing for petitioners tried to argue that the writ petition is maintainable. A writ petition filed under Article 226 or 227 of the Constitution of India is not maintainable when the remedy is provided in the form of second appeal. The learned counsel relied on a judgment of the Supreme Court in the case of Seth Chand Ratan v/s Pandit Durga Prasad and others, reported in (2003) 5 SCC 399 and argued that the petition is maintainable. Perusal of the said judgment shows that the Supreme Court has in categorical terms laid down that such a petition is not maintainable. Paragraph 13 of the said judgment is relevant which reads as under :-

> "13. Even otherwise, the view taken by the Division Bench of the High Court for repelling the objection of the appellant regarding the

maintainability of the writ petition that an alternative remedy does not divest the High Court of its powers to entertain petitions under Articles 226 and 227 of the Constitution, has hardly any application on the facts of the present case. It has been settled by a long catena of decisions that when a right or liability is created by a statute, which itself prescribes the remedy or procedure for enforcing the right or liability, resort must be had to that particular statutory remedy before seeking the discretionary remedy under Article 226 of the Constitution. This rule of exhaustion of statutory remedies is no doubt a rule of policy, convenience and discretion and the court may in exceptional cases issue a discretionary writ of certiorari. Where there is complete lack of jurisdiction for the officer or authority or tribunal to take action or there has been a contravention of fundamental rights or there has been a violation of rules of natural justice or where the Tribunal acted under a provision of law, which is ultra vires, then notwithstanding the existence of an alternative remedy, the High Court can exercise its jurisdiction to grant

relief. In the present case, the alternative remedy of challenging the judgment of the court was not before some other forum or tribunal. On the contrary, by virtue of sub-section (3) of section 27 of the Act, the order passed by the court amounted to a decree against which an appeal lay to the High Court. When the party had statutory remedy of assailing the order passed by the District Court by filing an appeal to the High Court itself, he could not bypass the said remedy and take recourse to proceedings under Articles 226 and 227 of the Constitution. Such a course of action may enable a litigant to defeat the provisions of the statute which may provide for certain conditions for filing the appeal, like limitation, payment of court fee or deposit of some amount or fulfilment of some other conditions for entertaining the appeal."

. It is clear that the Supreme Court has laid down this law consistently for the last so many years, still the litigants continue to file such petitions. Filing of such petition clearly amounts to abuse of process of the Court. After arguing the matter for some time, the learned counsel for petitioners sought leave

of the Court to withdraw the petition with liberty to adopt alternative remedy. Petition is allowed to be withdrawn. However, as in my opinion, filing of the petition itself amounts to abuse of process of the Court, to discourage litigants from abusing the process of the Court, I will be appropriate to impose exemplary cost on the petitioners for having filed petition though remedy by way of second appeal to this very Court was available. Accordingly, the petitioners are directed to pay Rs.10,000/- as and by way of costs to the respondents. The amount of costs to be paid within a period of two weeks from today.

. Parties to act on the copy of this order duly authenticated by the Sheristedar / Personal Secretary as true copy.

. Certified copy expedited.